

1  
2  
3  
4  
5  
6  
7 **UNITED STATES DISTRICT COURT**  
8 **FOR THE EASTERN DISTRICT OF WASHINGTON**

9 Seth Cunha, *on behalf of himself and all*  
10 *others similarly situated,*

11 Plaintiff

12 v.

13 Bluestem Brands, Inc. d/b/a Fingerhut,

14 Defendant.  
15  
16

NO.: 4:14-CV-5114

**CLASS ACTION COMPLAINT  
FOR DAMAGES AND  
INJUNCTIVE RELIEF  
PURSUANT TO 47 U.S.C. § 227,  
*et seq.* (TELEPHONE CONSUMER  
PROTECTION ACT)**

**Demand for Jury Trial**

17 For this Class Action Complaint, Plaintiff, Seth Cunha, by and through his undersigned counsel,  
18 pleading on his own behalf and on behalf of all others similarly situated, states as follows:  
19

20 **INTRODUCTION**

21 1. Plaintiff, Seth Cunha (“Plaintiff”), brings this class action for damages resulting from the  
22 illegal actions of Bluestem Brands, Inc. d/b/a Fingerhut (“Bluestem” or “Defendant”). Defendant  
23 negligently, knowingly, and/or willfully placed automated calls to Plaintiff’s cellular phone in violation  
24 of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (the “TCPA”).  
25

26 2. Defendant is a privately held finance company that specializes in retail installment  
27 contracts.

**CLASS ACTION COMPLAINT**

THOMAS MCAVITY  
2225 NE ALBERTA, STE A  
PORTLAND OR 97211  
Tel: 206-674-4559  
Facsimile: 866.241.4176



**THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**

11. The TCPA regulates, among other things, the use of automatic telephone dialing systems.

12. 47 U.S.C. § 227(a)(1) defines an automatic telephone dialing system (“ATDS”) as equipment having the capacity –

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

13. Specifically, 47 U.S.C. § 227(1)(A)(iii) prohibits any call using an ATDS or an artificial or prerecorded voice to a cellular phone without prior express consent by the person being called, unless the call is for emergency purposes.

**ALLEGATIONS APPLICABLE TO ALL COUNTS**

14. In or around September 2013, Defendant began placing calls to Plaintiff’s cellular telephone number, 509-xxx-4015.

15. Defendant placed the calls to Plaintiff from number 855-636-3695.

16. When answering Defendant’s calls, Plaintiff heard a period of silence before a live representative came on the line. Each time, the representative would tell Plaintiff that Defendant was attempting to reach “Kevin”. Each time, Plaintiff would tell the representative that he did not know “Kevin”, and that he could not be reached at Plaintiff’s cellular phone number. Nonetheless, Defendant continued to call Plaintiff.

17. Defendant obtained Plaintiff’s telephone number through unknown means.

18. At no time did Plaintiff ever provide his cellular phone number to Defendant.

19. At no time did Plaintiff ever enter into a business relationship with Defendant.

20. At no time did Plaintiff provide Defendant with prior written consent allowing it to

**CLASS ACTION COMPLAINT**

THOMAS MCAVITY  
2225 NE ALBERTA, STE A  
PORTLAND OR 97211  
Tel: 206-674-4559  
Facsimile: 866.241.4176

1 call his cellular phone.

2 21. The calls placed to Plaintiff's cellular phone were made with an ATDS.

3 22. Defendant employs an ATDS which meets the definition set forth in 47 U.S.C.  
4 § 227(a)(1), and used its ATDS to make each of the aforementioned calls to Plaintiff on his cellular  
5 phone.  
6

7 23. The Federal Communications Commission has defined ATDS, under the TCPA, to  
8 include "predictive dialers." *See In the Matter of Rules and Regulations Implementing the Telephone*  
9 *Consumer Protection Act of 1991*, 23 F.C.C.R. 559, at ¶ 12, 2008 WL 65485 (F.C.C.) (2008).

10 24. Defendant's telephone system has all the earmarks of a predictive dialer. When  
11 Defendant called Plaintiff, there was a period of silence before Defendant's telephone system would  
12 connect Plaintiff to live person.  
13

14 25. Defendant's calls to Plaintiff's cellular telephone were not for "emergency purposes."  
15

## 16 CLASS ACTION ALLEGATIONS

### 17 A. The Classes

18 26. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23 on behalf of  
19 himself and all others similarly situated.

20 27. Plaintiff represents, and is a member of the following classes:

21 **Class A: All persons within the United States who received any telephone calls**  
22 **from Defendant or their agent/s and/or employee/s to said person's cellular**  
23 **telephone made through the use of any automatic telephone dialing system within**  
**the four years prior to the filing of the Complaint where the Defendant obtained**  
**the cellular telephone number from a third party and not the called party.**

24 **Class B: All persons within the United States who received any telephone calls**  
25 **from Defendant or their agent/s and/or employee/s to said person's cellular**  
26 **telephone made through the use of any automatic telephone dialing system within**  
27 **the four years prior to the filing of the Complaint where the called party was not**  
**the person Defendant was trying to reach.**

CLASS ACTION COMPLAINT

THOMAS MCAVITY  
2225 NE ALBERTA, STE A  
PORTLAND OR 97211  
Tel: 206-674-4559  
Facsimile: 866.241.4176

1           28. Defendant and its employees or agents are excluded from the Classes. Plaintiff does  
2 not know the number of members in the Classes, but believes the Class members number in the  
3 several thousands, if not more. Thus, this matter should be certified as a class action to assist in the  
4 expeditious litigation of this matter.  
5

6           29. This suit seeks only damages and injunctive relief for recovery of economic injury on  
7 behalf of the Classes, and it expressly is not intended to request any recovery for personal injury and  
8 claims related thereto. Plaintiff reserves the right to modify or expand the Class definitions to seek  
9 recovery on behalf of additional persons as facts are learned through further investigation and  
10 discovery.  
11

12 **B. Numerosity**

13           30. Upon information and belief, Defendant has placed automated calls to cellular  
14 telephone numbers belonging to thousands of consumers throughout the United States without their  
15 prior express consent. The members of the Classes, therefore, are believed to be so numerous that  
16 joinder of all members is impracticable.  
17

18           31. The exact number and identities of the Class members are unknown at this time and  
19 can only be ascertained through discovery. Identification of the Class members is a matter capable of  
20 ministerial determination from Defendant's call records.  
21

22 **C. Common Questions of Law and Fact**

23           32. There are questions of law and fact common to the Classes that predominate over any  
24 questions affecting only individual Class members. These questions include:

- 25           a. Whether Defendant made non-emergency calls to Plaintiff and Class members'  
26           cellular telephones using an ATDS;  
27           b. Whether Defendant can meet its burden of showing it obtained prior express

**CLASS ACTION COMPLAINT**

THOMAS MCAVITY  
2225 NE ALBERTA, STE A  
PORTLAND OR 97211  
Tel: 206-674-4559  
Facsimile: 866.241.4176

1 consent to make each call;

2 c. Whether Defendant's conduct was knowing willful, and/or negligent;

3 d. Whether Defendant is liable for damages, and the amount of such damages; and

4 e. Whether Defendant should be enjoined from such conduct in the future.

5  
6 33. The common questions in this case are capable of having common answers. If  
7 Plaintiff's claim that Defendant routinely places automated calls to telephone numbers assigned to  
8 cellular telephone services is accurate, Plaintiff and the Class members will have identical claims  
9 capable of being efficiently adjudicated and administered in this case.

10 **D. Typicality**

11 34. Plaintiff's claims are typical of the claims of the Class members, as they are all based  
12 on the same factual and legal theories.

13  
14 **E. Protecting the Interests of the Class Members**

15 35. Plaintiff will fairly and adequately protect the interests of the Classes and has retained  
16 counsel experienced in handling class actions and claims involving unlawful business practices.  
17 Neither Plaintiff nor his counsel has any interests which might cause them not to vigorously pursue  
18 this action.

19  
20 **F. Proceeding Via Class Action is Superior and Advisable**

21 36. A class action is the superior method for the fair and efficient adjudication of this  
22 controversy. The interest of Class members in individually controlling the prosecutions of separate  
23 claims against Bluestem is small because it is not economically feasible for Class members to bring  
24 individual actions.

25 37. Management of this class action is unlikely to present any difficulties. Several courts  
26 have certified classes in TCPA actions. These cases include, but are not limited to: *Mitchem v. Ill.*

27 **CLASS ACTION COMPLAINT**

THOMAS MCAVITY  
2225 NE ALBERTA, STE A  
PORTLAND OR 97211  
Tel: 206-674-4559  
Facsimile: 866.241.4176

1 *Collection Serv.*, 271 F.R.D. 617 (N.D. Ill. 2011); *Sadowski v. Med1 Online, LLC*, 2008 WL 2224892  
2 (N.D. Ill., May 27, 2008); *CE Design Ltd. V. Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D. Ill.  
3 2009); *Lo v. Oxnard European Motors, LLC*, 2012 WL 1932283 (S.D. Cal., May 29, 2012).

4  
5 **COUNT I**  
6 **Negligent Violations of the Telephone Consumer Protection Act,**  
7 **47 U.S.C. § 227, et seq.**

8 38. Plaintiff repeats and realleges the above paragraphs of this Complaint and  
9 incorporates them herein by reference.

10 39. Defendant negligently placed multiple automated calls to cellular numbers belonging  
11 to Plaintiff and the other members of the Classes without their prior express consent.

12 40. Each of the aforementioned calls by Defendant constitutes a negligent violation of the  
13 TCPA.

14 41. As a result of Defendant's negligent violations of the TCPA, Plaintiff and the Classes  
15 are entitled to an award of \$500.00 in statutory damages for each call in violation of the TCPA  
16 pursuant to 47 U.S.C. § 227(b)(3)(B).

17 42. Additionally, Plaintiff and the Classes are entitled to and seek injunctive relief  
18 prohibiting such conduct by Defendant in the future.

19  
20 **COUNT II**  
21 **Knowing and/or Willful Violations of the Telephone Consumer Protection Act,**  
22 **47 U.S.C. § 227, et seq.**

23 43. Plaintiff repeats and realleges the above paragraphs of this Complaint and  
24 incorporates them herein by reference.

25 44. Defendant knowingly and/or willfully placed multiple automated calls to cellular  
26 numbers belonging to Plaintiff and the other members of the Classes without their prior express  
27 consent.

**CLASS ACTION COMPLAINT**

THOMAS MCAVITY  
2225 NE ALBERTA, STE A  
PORTLAND OR 97211  
Tel: 206-674-4559  
Facsimile: 866.241.4176

1           45.     Each of the aforementioned calls by Defendant constitutes a knowing and/or willful  
2 violation of the TCPA.

3           46.     As a result of Defendant's knowing and/or willful violations of the TCPA, Plaintiff  
4 and the Classes are entitled to an award of treble damages up to \$1,500.00 for each call in violation  
5 of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).  
6

7           47.     Additionally, Plaintiff and the Classes are entitled to and seek injunctive relief  
8 prohibiting such conduct by Defendant in the future.

9  
10                                   **PRAYER FOR RELIEF**

11           WHEREFORE, Plaintiff prays that the Court grant Plaintiff and the Classes the following  
12 relief against Defendant:

- 13           1. Injunctive relief prohibiting such violations of the TCPA by Defendant in the future;  
14           2. Statutory damages of \$500.00 for each and every call in violation of the TCPA pursuant  
15           to 47 U.S.C. § 227(b)(3)(B);  
16           3. Treble damages of up to \$1,500.00 for each and every call in violation of the TCPA  
17           pursuant to 47 U.S.C. § 227(b)(3)(C);  
18           4. An award of attorney's fees and costs to counsel for Plaintiff and the Classes; and  
19           5. Such other relief as the Court deems just and proper.  
20

21                                   **TRIAL BY JURY DEMANDED ON ALL COUNTS**

22           Dated: October 22, 2014  
23

24                                   By: Tom McAvity  
25                                   Thomas McAvity, WSBA# 35197  
26                                   Northwest Debt Relief Law Firm  
27                                   2225 NE Alberta Suite A  
                                      Portland, OR 97211  
                                      206-674-4559

**CLASS ACTION COMPLAINT**

**THOMAS MCAVITY**  
**2225 NE ALBERTA, STE A**  
**PORTLAND OR 97211**  
**Tel: 206-674-4559**  
**Facsimile: 866.241.4176**